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IN THE

Supreme Court of the United States

October Term, 1957

JOSEPH AGUILAR GAITAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

DOLORES MARY GAITAN, *Petitioner*,

v.

UNITED STATES OF AMERICA

ANISETO SILVA, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, affirming their convictions for violation of 26 U.S.C. Sec. 4742 (a); the Gaitans also 26 U.S.C. Secs. 4744 (a) (1) and 4744 (a) (2); Silva also 26 U.S.C. Secs 4744 (a) (2) and 4742 (a).

Opinion Below

The opinion of the Court of Appeals (App. A) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered January 23, 1958 (App. B). A petition for rehearing was denied on February 8, 1958 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Whether evidence secured by illegal search and seizure by state officers is admissible in a federal court.

2. Whether evidence secured by illegal search and seizure by state officers handed to federal officers who entered without a search warrant is admissible in a federal court.

3. Whether violation of the due process clause of the Fifth Amendment occurs when the character of the defendants is assailed by the presentation in the government's case-in-chief of exhibits showing prior arrests of the defendants.

Constitution Involved

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment V:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Statement

On February 20, 1957, the Grand Jury for the District of Colorado returned an indictment in five counts charging all the petitioners with a conspiracy to unlawfully sell marihuana, in violation of 26 U.S.C. Sec. 4742 (a) and 26 U.S.C. Sec. 7237. Petitioner Silva was charged also with unlawfully acquiring marihuana, in violation of 26 U.S.C. Sec. 4744 (a) (2), and unlawfully transferring marihuana, in violation of 26 U.C.S. Sec. 4742 (a). Petitioners Gaitans were also charged with unlawful acquisition of marihuana, in violation of 26 U.S.C. Sec. 4744 (a) (1), and unlawful concealment of marihuana, in violation of 26 U.S.C. Sec. 4744 (a) (2).

Most of the facts in this case concerning illegal searches and seizures are not in dispute.

Officers of the Denver Police Department had the Gaitans' premises at 1831 Williams Street under surveillance with binoculars and a walkie-talkie (R. 71).* At 8:45 p.m. on February 5, 1957, Denver Police Officers arrested petitioner Silva and another person as they emerged from the side entrance of the apartment house in question (R. 48). There was no warrant of arrest or search.

The same officers forcibly entered the Gaitan apartment without a warrant for arrest or search (R. 39). A search was conducted and six pounds of marihuana were found in an unexcavated portion of the basement adjacent to the Gaitans' basement apartment (R. 50, R. 40).

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* "R." refers to the record filed below.

During this time of search, the Federal Bureau of Narcotics was contacted by telephone (R. 46, 32). Two federal agents entered the Gaitans' apartment without the owners' permission and, without a search warrant, "observed" and "looked" (R. 32, 34). Federal agent Gress accompanied the Gaitans in a police car "assisting Captain Nelson to take them to the police department" (R. 36).

Upon arriving at the police station, the federal agents went to the Police Department parking lot and searched Silva's car and seized certain evidence without Silva's permission and without a warrant (R. 89).

Before the trial, petitioners' motion to suppress the evidence on the basis of cooperation between state and federal officers, all of whom had no search warrants, was denied (R. 11-12). The Court felt that no federal officer had participated in the illegal search and seizure.

At the trial, during the government's case-in-chief, there were produced and marked before the jury four (4) exhibits (R. 81), each of which contained four (4) other exhibits. They were prejudicial and inadmissible (R. 84). Still the Court denied petitioners' timely motion over objection for a mistrial on the basis that the jury was not influenced, even though he was not in a physical position to see the exhibits and their close proximity to the jury box (Stipulation for Supplemental Record, p. 2).

The exhibits were Arrest Records, Photographs of Petitioners, with DENVER POLICE written thereon, Denver Police Department Complete Arrest and Disposition Records, the United States Department of Justice, Federal Bureau of Investigation, Arrest Charge and Disposition Record, and complete black and white photographs of petitioners' fingerprints, which were all marked as GOVERNMENT'S EXHIBITS 19, 20, 21, and 22.

The jury found the petitioners guilty of all counts alleged in the indictment. Petitioner Joseph A. Gaitan was sentenced for a term of ten (10) years, his wife was sentenced for five (5) years, and Silva was sentenced for five (5) years (R. 16. 17, 18).

The Court of Appeals found that neither state nor federal officers had search warrants, but that the state completed its search and seizure by the time the federal officers arrived, thus there was lacking a decisive factor necessary to show federal participation in the illicit acquisition. (See App. A)

Reasons for Granting the Writ

Opinions in this Court have repeatedly reflected an awareness of the dangers of encouraging lawlessness on the part of state and federal officers in prosecutions based on illegal searches and seizures.

1. This Court has commented in a recent case, that "It has remained an open question in this Court whether evidence obtained solely by the state agents in an illegal search may be admissible in Federal Court, despite the Fourth Amendment. See *Lustig v. United States,* 338 U. S. 74, 78-79." *Benanti vs. United States,* 28 Sup. Ct. 155, 2 L. Ed. 2d 126, footnote 10. It is vital that an answer be given to this question, the present confused status of which is sowing official lawlessness in our society and in our courts.

It is well settled that the fruit of an illegal search and seizure by federal officers is inadmissible in a federal court. *Weeks vs. United States,* 232 U. S. 383.

It has also been held that if there is attendant federal activity incident to the search even though the state officer alone turns up the evidence, there is an illegal search and

evidence so obtained is inadmissible in a federal court. *Lustig v. United States,* 338 U. S. 74.

The Circuits are in hopeless conflict on this question and seem to be guided solely by factual interpretation as to whether or not a federal official had a hand in the search. In the following cases an illegal search was found: *Gambino v. United States,* 275 U. S. 310; *Sutherland v. United States,* D. C. 1955, 219 F. (2d) 37 and *United States v. Amoia,* 91 F. Supp. 223.

On the other hand, the same doctrine brought opposite results in *Jones v. United States,* 8 Cir. 1954, 217 F. (2d) 381; *Symons v. United States,* 9 Cir 1949, 178 F. (2d) 613; and *Gilbert v. United States,* 10 Cir. 1947, 163 F. (2d) 615.

Dicta in Lustig has been seized upon recently by the trial courts and the Circuits. It is the "silver platter" doctrine which states that there has not been an illegal search by a federal officer if evidence is secured by State authorities and turned over to the federal authorities on a silver platter.

The food on the silver platter already has been poisoned with the corruption of illegal search and seizure. Should a court of law allow the subversion of due process of law and the Fourth Amendment indirectly when it disallows it directly? This Court should protect our citizens and the sanctity of the home and private property by preserving the freedom from illegal searches and seizures so clearly demanded by the Constitution of the United States. Should federal courts ratify the lawless breaking and entering of state officers by allowing the ill-gotten fruits thereof to be introduced in a federal court of law? Until this question is firmly answered in the negative, the courts will be spawning grounds for official conspiracies to cir-

cumvent the spirit of a law which may be complied with literally.

Recently a federal officer was enjoined from testifying in a state court about his illegally seized evidence. *Rea v. United States,* 350 U.S. 214. It was also held that federal courts have the power to police its officers to the end that federal rules governing search and seizure are observed. The decisive factor should be not *who* illegally searched and seized, but that there *was* an illegal search and seizure, with the result that one of the most basic rights of the individual has been outrageously infringed.

In *Benanti, supra,* this court stated that it has remained an open question whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment. This question, reeking with official lawlessness, encouraged by the "silver platter" doctrine, should be answered with finality by this Court. This question must be resolved once and for all if our constitutional rights have any real meaning.

2. The "silver platter" doctrine was the decisive factor in the Tenth Circuits affirmance of the court below. However, even *Lustig supra,* held that "The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."

In this connection the Circuit Court failed to consider the active participation of the federal officers in the illegal search and seizure by entering the premises without a warrant of any kind. Also the Court failed to consider other indicia of participation and cooperation such as telephonic communications and a search of petitioner's car by fed-

eral officers without a warrant on the evening in question. While the evidence seized from Silva's automobile was not sought to be suppressed, the method of obtaining the same is a clear indication that the federal officers were continuing the search that evening and were *cooperating* with the local police in the *entire* chain of events involved in the arrests.

3. Petitioner's were denied due process of law when one of the fundamental rules of evidence was violated. Petitioners' character was assailed before the petitioners themselves had put their character in issue. This cannot be done in a court of law and requires a mistrial. *Thompson v. Bowie,* 4 Wall. 463; *Williams v. United States,* 168 U. S. 382; *Gardner v. United States,* 253 Fed. 53.

It was not incumbent upon petitioners to show that the jurors were actually influenced by the "mug shots", police records, fingerprints etc. In *Little v. United States,* 73 F. (2d) 861, at 866, it was held:

> " . . . where error occurs which within the range of a reasonable possibility may have affected the verdict of the jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. . . . The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

Petitioners feel that they were tainted with the stigma of being criminals with prior police records and criminal history before they took the stand. In fact petitioner Silva had no prior record and is a Corporal in the United States Army. Mrs. Gaitan, mother of three children had no prior record.

The process of marking the sixteen admittedly preju-

dicial exhibits took several minutes, thus, it was physically impossible that counsel for appellants "immediately" approached the bench to ask for a mistrial as stated at page 17 of the opinion. (App. A) The prejudicial exhibits were in full view of the jury for several minutes during the marking of the exhibits.

It is stated at page 17, by the lower court, that "The Court did not share in the belief that the jury had seen the exhibits or observed them to the extent that they knew the contents thereof . . ." and also that "The trial court was in much better position to observe and evaluate the effect of what had occurred . . ." *That this was not so is evident from the trial judge's own statement.* "The Court: Of course, the Court is in a position physically that I am not able to observe expressly what happened. The Court did not observe any pictures of anything in connection with the exhibits, but of course, the reporter sits in front of the Bench and the Court of course, did not see the actual marking of the exhibits, but counsel for the defendants apparently observed what they were . . ." (Stipulation for Supplemental Record, p. 2).

Thus, the trial court was not in a position to observe what happened because of his physical position on the bench.

In *U. S. v. Dressler*, 112 F. (2d) 972 at 978, the Court pursuing the same question, stated:

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

In this case, there was no showing that there was no prejudice. In fact, the court held the exhibits *were* prejudicial and inadmissible when *later* he saw what they were. *In the crucial time when the reporter was marking the*

exhibits in full view of the jury, the Court was not in a position to observe the damage being done. Thus the lower court denied petitioners due process of law when it did not reverse the trial court's refusal to grant a mistrial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Counsel for Petitioners.

Appendix A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 5709, 5710, 5711, 5728, JANUARY TERM, 1958

Joseph Aguilar Gaitan,
Appellant,
v.
United States of America,
Appellee.

Dolores Mary Gaitan,
Appellant,
v.
United States of America,
Appellee.

Aniseto Silva,
Appellant,
v.
United States of America,
Appellee.

Joe Anthony Emmett,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the District of Colorado.

Filed United States Court of Appeals, Tenth Circuit. Robert B. Cartwright, Clerk

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Walter L. Gerash and Francis P. O'Neill for appellant.
John S. Pfeiffer for appellee.

Before BRATTON, and PICKETT, Circuit Judges, and RICE, District Judge.

RICE, District Judge.

The appellants, defendants in the trial court, and hereinafter referred to as defendants, were charged by indictment with violations of the narcotics laws relating to marihuana. All defendants were charged with conspiracy to transfer marihuana in violation of 26 U.S.C. § 4742 (a). Joseph Aguilar Gaitan and Dolores Mary Gaitan, husband and wife, hereinafter referred to as the Gaitans, were jointly charged in Counts 4 and 5 with possession and concealment of marihuana in violation of 26 U.S.C. §§ 4744 (a)(1) and 4744(a)(2). Aniseto Silva and Joe Anthony Emmett, hereinafter referred to as Silva and Emmett, were jointly charged in Counts 2 and 3 with transporting and transferring marihuana in violation of 26 U.S.C. §§ 4744(a)(2) and 4742 (a). Each defendant was convicted as charged. Joseph Gaitan received a ten-year sentence. Each of the other defendants received a five-year sentence.

The Gaitans and Silva joined in filing, prior to trial, a motion to suppress evidence. The Gaitans filed separate but identical affidavits in support of the motion, asking that the search of their apartment be declared unreasonable, illegal, and void and that the United States Attorney be precluded from using the evidence obtained by the search against them, and alleging generally that their dwelling place was "forcibly and illegally broken into and illegally entered"; that no warrant of arrest was served or displayed by the officers, either State or Federal; that

"no search warrant was served or displayed by the State or Federal officers and that the search was a violation of the Fourth Amendment." Silva filed no affidavit but apparently relies upon the affidavits of the Gaitans.

Emmett, by his attorney, filed a motion to suppress for use as evidence "anything obtained on or about the 5th day of February, 1957, at the premises known and numbered at 1831 Williams Street, City and County of Denver in the District of Colorado, which was unlawfully seized and taken from the defendants Joseph Aguilar Gaitan and Dolores Mary Gaitan by a deputy of the United States Marshal or an agent of the Federal Bureau of Investigation . . . ." Emmett further charged that the property was seized under the authority and control of the Federal Government. Emmett's motion was not supported by affidavit. None of the defendants asserted ownership or possession of the property alleged to have been illegally seized.

The property seized was a 5 pound 14 ounce bag of marihuana found concealed in the Gaitans' apartment. A tobacco can of marihuana was found on and seized from the person of Emmett after his arrest at the entrance of the apartment building in which the Gaitans lived. On the hearing of the motion to suppress evidence, the defendants, assuming the burden of proof, endeavored to establish that the search and seizure were participated in by Federal officers. On the other hand, it was the contention of the Government that the search and seizure were conducted entirely by State officers, members of the police force of the City and County of Denver, without any participation on the part of the Federal officers. *There was never any contention that the State officers had a warrant for the arrest of any of the defendants or had a search warrant authorizing them to search the apartment in which the*

Gaitans lived, or the person of any defendant. The evidence clearly establishes that the police officers, after having had the apartment under surveillance for several hours, entered the apartment building at approximately 8:30 p.m., and arrested Silva and Emmett in the hallway leading to the apartment occupied by the Gaitans; that a tin of marihuana was found and seized from the person of Emmett, and that a bag containing 5 pounds 14 ounces of marihuana was found and seized as a result of a search of the Gaitan apartment.

After the tin of marihuana had been seized and the bag containing 5 pounds 14 ounces of marihuana had been found and seized, one of the police officers called the Federal narcotics agents, and at approximately 9:30 p.m. two narcotics agents came to the apartment. Officer Nelson, Captain of Police, stated in his testimony that before the Federal officers arrived, "our investigation was all complete." *The Federal officers, upon arrival, saw the situation as it existed. They saw the marihuana that had been seized, and thereafter accompanied the local officers and the defendants to police headquarters.* Defendants were lodged in the city jail over night under authority of the City and County of Denver. Habeas corpus proceedings were begun by some of the defendants in the State Court and hearing for others was sets for an early date. Thereupon, the Captain of the State police made a change slip and placed a hold order for the Federal narcotics agents. This change was made, according to the officer's testimony, several days later. The police officers retained custody of the marihuana, and at the time of the hearing on the motions had custody of the marihuana.

The case was tried by the Government on the theory that the search and seizure were conducted by State offi-

cers without participation by the Federal officers. The defendants contended in the trial court that there was participation by Federal officers, and by reason thereof the evidence secured as a result was inadmissible. Attorneys for the defendants concede that evidence obtained illegally by State officers may be used in a Federal court prosecution, and the attorneys for the Government concede that evidence obtained by illegal search by Federal officers or by State officers and Federal officers may not be used in Federal court.

While opposing counsel agree upon the basic legal questions involved, they do not agree upon the application of the facts; and, ultimately, the attorneys for both defendants and the Government are confronted with and find comfort in the language of Lustig vs. United States, 338 U. S. 74.

Byars vs. United States, 273 U. S. 28, preceded Lustig by twenty-two years. In Byars, the Court said: "While it is true that the mere participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." Byars further held: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

In Lustig, the Court, in discussing the Byars case said: "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applica-

bility of the Byars case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."

At the conclusion of the hearing on the motions to suppress, the trial court overruled the motions and made the following statement: "In this case, the whole transaction was completed long before there was any Federal Agent ever told about the matter at all. And there was no selection of evidence or no going over the evidence except that Mr. Gress did look at the marihuana, just visually inspected it according to all the testimony and then the next day or some day following, was when it was turned over by another officer, by Captain Nelson, to the Narcotics Bureau."

Again, the trial court said: "The basic question is whether there was sufficient Federal participation to bring the rule within the Federal Rule or whether the search by the State Officers is subject to examination on that basis."

Repeatedly, in ruling on the motion to suppress, the Court stated that the search and seizure were made without the participation or involvement of any Federal officer.

We have carefully read the entire record. There is no material conflict as to what actually occurred and as to when it occurred. We agree with the trial court's summary of the facts and in its conclusion. We share the view of the trial court that the decisive factor necessary to show participation of Federal officials in the search and seizure is lacking.

II

There remains for consideration a second contention of the defendants and that is alleged misconduct of the Government attorney, which they assert was prejudicial to

the rights of the defendants and by reason thereof they were entitled to a mistrial. Again, there is no disagreement as to what actually occurred. The attorney for the Government called as a Government witness the lieutenant in charge of the Bureau of Identification of the Police Department of the City and County of Denver and asked him if he had certain records; and when the lieutenant responded that he did have the records, he was asked to produce them. The records were the police records that had been made at the time the defendants were lodged in jail. There were four exhibits — one for each defendant. When the records were produced, the attorney handed them to the reporter to be marked for identification. Immediately, the attorneys for the defendant approached the bench and asked the Court to declare a mistrial. The court recessed, and in chambers the matter was fully presented to the trial court. The attorneys for the defendants stated that they believed that the jury had seen or could have seen the exhibits and that, as a result, might be prejudiced against the defendants. *The Court did not share in the belief that the jury had seen the exhibits or observed them to the extent that they knew the contents thereof.* The Court agreed that the exhibits were not proper evidence, particularly at the time they were identified, and directed that they not be returned to the courtroom and denied the motion for mistrial. The trial court was in *much better position to observe and evaluate the effect of what had occurred,* and we accept his conclusion that the identification of the exhibits, under the circumstances, was not sufficient to require a mistrial.

Judgment of the trial court is AFFIRMED.

Appendix B

Judgment of Joseph Aguilar Gaitan.

Fourteenth Day, January Term, Thursday, January 23rd, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honarable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Joseph Aguilar Gaitan, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the Judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment of Dolores Mary Gaitan.

Fourteenth Day, January Term, Thursday, January 23rd, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honarable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Dolores Mary Gaitan, appellant, surrender herself to the custody of the United States Marshal for the District of Colorado, in execution of the Judgment and sentence imposed upon her, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment of Aniseto Silva.

Fourteenth Day, January Term, Thursday, January 23rd, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honarable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

Order Denying Petition for Rehearing.

Twenty-fifth Day, January Term, Saturday, February 8th, 1958.

Before Honorable Sam G. Bratton, Chief Judge, Honorable John C. Pickett, Circuit Judge, and Honorable Eugene Rice, District Judge.

These causes came on to be heard on the petition of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.